Neduncheliyan Balasubramaniam v Kohila a/p Shanmugam

COURT OF APPEAL — CIVIL APPEAL NO A-02-250 OF 1997
MAHADEV SHANKAR, MOKHTAR SIDIN AND DENIS ONG JJCA
13 AUGUST 1997

Family Law *— Children — Custodianship — Application by Malaysian mother for custody of children who are Canadian citizens — Children in Malaysia for holiday — Whether court has jurisdiction to entertain custody application — Whether jurisdiction correctly exercised — Law Reform (Marriage and Divorce) Act 1976 s 3(1) & Pt VIII — Federal Constitution art 121(1A) — Guardianship of Infants Act 1961 s 1(3)*

Civil Procedure *— Jurisdiction — Infant, custody of — Application by Malaysian mother for custody of children who are Canadian citizens — Children in Malaysia for holiday — Whether court has jurisdiction to entertain custody application — Whether jurisdiction correctly exercised — Law Reform (Marriage and Divorce) Act 1976 s 3(1) & Pt VIII — Federal Constitution art 121(1A) — Guardianship of Infants Act 1961 s 1(3)*

The respondent ('the wife') was a Malaysian citizen. In 1989, she married the appellant ('the husband') who was a Canadian national. In 1991, the wife was granted permanent residence in Canada. Their son and daughter were born in Canada and were Canadian citizens. The family arrived in Malaysia in December 1996 for a holiday where they stayed with the wife's parents. On 4 February 1997, the wife filed an originating summons praying for, inter alia, an order that she be given custody of the two children and an injunction to restrain the husband from seeing, meeting, beating, assaulting, interfering or communicating with the wife or her parents in any way. Subsequently, the wife filed a divorce petition which contained accusations about various alleged acts of cruelty on the part of the husband. On 24 February 1997, the judge made an order that interim custody be given to the wife pending the outcome of the divorce petition. The husband applied to strike out the divorce petition on the ground that the court had no jurisdiction to entertain it. The judge struck out the petition and held that although the wife was a Malaysian citizen, she had taken up permanent residence in Canada and she had a Canadian domicile because her husband was a Canadian citizen residing in Canada. The husband then applied for an order that the children be returned to him since the interim order of 24 February 1997 was conditioned to be effective only up to the disposal of the divorce petition and the petition had been struck out. On 3 May 1997, the judge held that the court had jurisdiction to hear the application for custody by the wife and granted custody and control of the two children to the wife with reasonable access to the husband. The judge found that neither parent could be said to be a wrongdoer towards the infants who were well taken care of, but held that for some indefinite period, the children must remain in Malaysia with the wife because the wife was justified in refusing to

A return to Canada with the husband and their children for fear of her life and safety. The husband appealed.

Two legal issues before the court were: (i) whether the court had jurisdiction to entertain a custody application by their Malaysian mother bearing in mind that the children were Canadian citizens B and they had come to this country on a holiday; and (ii) if the court had jurisdiction, whether it was correctly exercised by the High Court when it gave the mother custody for an indefinite time in Malaysia.

C **Held**, setting aside the order of the High Court:

(1) Section 3(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') states that 'Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia'. The use of the word 'domicile', as opposed to physical presence, D in the second limb of s 3(1) militates against the interpretation that 'all persons in Malaysia' must be read to mean all persons 'ordinarily resident' in Malaysia. In the present context, the expression 'ordinarily resident' is only relevant to the divorce jurisdiction of the court. The ordinary meaning of the first limb of s 3(1) therefore is that the Act applies to all persons physically E present in Malaysia unless the Act otherwise provides. Since the wife was not domiciled in Malaysia but was ordinarily resident in Canada, the second limb of s 3(1) did not apply to her. But the wife and her children were physically present in Malaysia at all times material to this application. Therefore, they came within F the first limb of s 3(1).

Further, Pt VIII of the Act read with s 1(3) of the Guardianship of Infants Act 1961 and also art 121(1A) of the Federal Constitution was intended to cover all children who were physically present within the jurisdiction who do not profess the G religion of Islam. Clearly, the Malaysian court did have jurisdiction and power to make any order required for the protection of the children in this case (see pp 785B–D and 786C–D).

(2) There is a critical difference between the duration of the protection a court can accord to children who are long term residents of this H country as Malaysian citizens or the children of Malaysian permanent residents, and those children who are only transient visitors to this country because they are children of foreign nationals. In the latter, the duration of the protection afforded should only be for so long as the children can lawfully remain in the country, and the court should only intervene if the harm to I the children can be classified as a real and immediate danger to their physical well-being from anyone including their parents.

In this case, the only inference was that the children were in no physical danger from their father. Therefore, the court had to

fall back on the other reason advanced to support the judge's finding, namely that the wife was justified in refusing to return to Canada with her husband and their children. Such a justification must rest on an acceptance of all her charges of misconduct as having been substantially proved. The onus was squarely on the wife. The court found that there were only bare assertions by the wife with no credible independent evidence to support them (see pp 787E–I, 788A and 782C).

Further, it was not desirable for the Malaysian courts to make a full inquiry into the wife-husband disputes in cases such as the present where the court was satisfied that no obvious harm would come to the children by sending them back to Canada. The basic rule is that the paramount consideration is the well-being of the infants. But where the children are Canadian nationals, the question is where do the children belong, where is the matrimonial establishment, and which is the proper court to decide the future of these Canadian nationals (see pp 788B–C and 790G); *Re T (Infants)* [1968] 1 Ch 704, *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250 and *G v G (Minors) (Abduction)* Vol 21 [1991] Family Law 519 followed.

Admittedly, the wife retained her Malaysian citizenship, but she applied for permanent residence in Canada. The simple meaning of this was that she declared to the Canadian authorities that for the rest of her foreseeable life she intended that Canada should be the country in which she would ordinarily reside. It was expected the she would honour and abide by the laws of Canada which had conferred her with the status of permanent residence. She should therefore have referred her problems with regard to her Canadian children to the Canadian courts and abided by their decision (see p 791B–C).

Therefore, the court hereby set aside the order of the High Court but the court did not make any concluded view as to which parent should have permanent exclusive custody of the children. That was a matter for the Canadian courts. The children should be delivered into the care and custody of the husband who shall be at liberty to remove them to Canada to the matrimonial home and such removal shall take place soonest possible (see p 792H–I).

Per curiam:

Any Malaysian woman upon marriage will acquire her husband's domicile and until that marriage is lawfully dissolved, she will retain the domicile of her husband. In the present case, notwithstanding the fact that the wife held a Malaysian passport and must therefore be presumed to be a citizen of Malaysia, the evidence here had proved that she was not domiciled in Malaysia. There was the added factor that the wife freely elected to obtain permanent residence in Canada (see p 784E–H).

A [**Bahasa Malaysia summary**

Penentang ('si isteri') adalah seorang warganegara Malaysia. Dalam tahun 1989, dia telah berkahwin dengan perayu ('si suami') yang merupakan warganegara Kanada. Dalam tahun 1991, si isteri diberikan kemastautinan tetap di Kanada. Anak lelaki dan anak
B perempuan mereka dilahirkan di Kanada dan adalah rakyat Kanada. Keluarga ini tiba di Malaysia dalam bulan Disember 1996 untuk bercuti dan telah tinggal dengan ibu bapa si isteri. Pada 4 Februari 1997, si isteri memfailkan suatu saman pemula yang memohon, antara lain, suatu perintah bahawa dia diberikan jagaan kedua-dua anak dan suatu injunksi bagi menahan si suami daripada berjumpa,
C bertemu, memukul, menyerang, mengganggu atau berkomunikasi dengan si isteri atau ibu bapanya dalam apa-apa cara. Berikutnya, si isteri telah memfailkan suatu petisyen perceraian yang mengandungi pengataan tentang pelbagai perbuatan kejam pada pihak si suami. Pada 24 Februari 1997, hakim membuat satu perintah bahawa jagaan
D interim diberikan kepada si isteri sementara menunggu keputusan petisyen perceraian. Si suami memohon untuk membatalkan petisyen perceraian atas alasan bahawa mahkamah tidak mempunyai bidang kuasa untuk melayannya. Hakim membatalkan petisyen dan memutuskan bahawa meskipun si isteri adalah warganegara Malaysia, dia telah mengambil kemastautinan tetap di Kanada dan mempunyai
E domisil Kanada kerana suaminya adalah warganegara Kanada yang menetap di Kanada. Si suami kemudiannya memohon untuk satu perintah bahawa anak-anak dikembalikan kepadanya memandangkan perintah interim bertarikh 24 Februari 1997 disyaratkan berkuatkuasa hanya sehingga penyelesaian petisyen perceraian dan petisyen telah
F dibatalkan. Pada 3 Mei 1997, hakim memutuskan bahawa mahkamah mempunyai bidang kuasa untuk mendengar permohonan untuk jagaan oleh si isteri dan memberikan jagaan dan kawalan kedua-dua anak kepada si isteri dengan akses yang munasabah kepada si suami. Hakim mendapati bahawa tidak satu daripada ibu bapa yang berkenaan boleh dikatakan berlaku salah terhadap anak-anak yang
G dijaga dengan baik, tetapi memutuskan bahawa untuk suatu jangkamasa yang tidak tentu, anak-anak mesti tinggal di Malaysia dengan si isteri kerana si isteri berjustifikasi dalam keengganan untuk kembali ke Kanada dengan si suami dan anak-anak mereka kerana bimbangkan nyawa dan keselamatannya. Si suami merayu.

H Dua isu undang-undang di hadapan mahkamah adalah: (i) sama ada mahkamah mempunyai bidang kuasa untuk mendengar permohonan jagaan oleh ibu mereka yang merupakan seorang rakyat Malaysia dengan mengingati anak-anak adalah warganegara Kanada dan mereka telah datang ke negara ini untuk bercuti; dan (ii) sekiranya mahkamah mempunyai bidang kuasa, sama ada ia telah dilaksanakan
I dengan betulnya oleh Mahkamah Tinggi apabila ia memberikan jagaan untuk masa yang tidak tentu kepada ibu mereka di Malaysia.

Diputuskan, mengetepikan perintah Mahkamah Tinggi:

(1) Seksyen 3(1) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') menyatakan bahawa 'Melainkan dinyatakan sebaliknya Akta ini haruslah terpakai kepada semua orang di Malaysia dan semua orang yang berdomisil di Malaysia tetapi menetap di luar Malaysia'. Penggunaan perkataan 'domisil', berbanding dengan kehadiran fizikal, dalam bahagian kedua s 3(1) adalah bertentangan dengan tafsiran bahawa 'semua orang di Malaysia' mestilah dibaca sebagai membawa makna semua orang yang 'biasanya menetap' di Malaysia. Dalam konteks ini, ungkapan 'biasanya menetap' hanya relevan kepada bidang kausa perceraian mahkamah. Makna biasa bahagian pertama s 3(1) dengan itu adalah bahawa Akta tersebut terpakai kepada semua orang yang hadir secara fizikal di Malaysia melainkan Akta tersebut memperuntukkan sebaliknya. Oleh kerana si isteri tidak berdomisil di Malaysia tetapi biasanya menetap di Kanada, bahagian kedua s 3(1) tidak terpakai kepadanya. Tetapi si isteri dan anak-anaknya hadir secara fizikal di Malaysia pada semua masa yang material kepada permohonan ini. Oleh itu, mereka diliputi oleh bahagian pertama s 3(1).

Seterusnya, Bah VIII Akta tersebut dibaca dengan s 1(3) Akta Penjagaan Budak 1961 dan juga perkara 121(1A) Perlembagaan Persekutuan bertujuan untuk merangkumi semua anak-anak yang hadir secara fizikal dalam bidang kuasa yang bukan penganut agama Islam. Jelas, mahkamah Malaysia memang mempunyai bidang kuasa dan kuasa untuk membuat sebarang perintah yang diperlukan bagi perlindungan kanak-kanak dalam kes ini (lihat ms 785B–D dan 786C–D).

(2) Terdapat perbezaan yang kritikal di antara tempoh perlindungan yang boleh diberikan oleh mahkamah kepada budak yang adalah penetap negara ini sebagai warganegara Malaysia atau anak-anak pemastautin tetap Malaysia, dan anak-anak yang hanyalah pengunjung sementara ke negara ini kerana mereka adalah anak warganegara asing. Dalam kes kedua, tempoh perlindungan yang diberikan haruslah kekal sehingga berapa lama anak-anak boleh tinggal di negara itu dengan sahnya, dan mahkamah hanya patut campur tangan sekiranya kecederaan kepada anak-anak boleh dikelaskan sebagai bahaya yang nyata dan pasti akan berlaku yang mengancam kesejahteraan fizikal mereka daripada sesiapa termasuk ibu bapa mereka.

Dalam kes ini, satu-satunya inferens adalah bahawa anak-anak tidak berada dalam keadaan fizikal yang bahaya daripada ayah mereka. Maka, mahkamah terpaksa bergantung kepada alasan lain yang dikemukakan untuk menyokong pendapat hakim, iaitu bahawa si isteri berjustifikasi dalam keengganan untuk kembali ke Kanada dengan suaminya dan anak-anak mereka. Justifikasi demikian mestilah terletak pada suatu penerimaan segala pertuduhan salah laku sebagai telah dibuktikan secara

kukuh. Beban terletak sepenuhnya pada si isteri. Mahkamah mendapati bahawa apa yang terdapat cumalah pengataan kosong oleh si isteri tanpa keterangan bebas yang boleh dipercayai bagi menyokongnya (lihat ms 787E–I, 788A dan 782C).

Selanjutnya, adalah tidak elok untuk mahkamah Malaysia membuat siasatan penuh ke atas pertikaian suami isteri seperti dalam kes ini di mana mahkamah puas hati bahawa tiada bahaya yang nyata akan menimpa anak-anak dengan menghantar mereka balik ke Kanada. Rukun asas adalah bahawa pertimbangan yang paling utama adalah kesejahteraan budak-budak. Tetapi di mana anak-anak adalah warganegara Kanada, persoalan adalah di manakah asal anak-anak, di manakah tempat kediaman suami isteri dan mahkamah yang manakah wajar memutuskan masa depan warganegara Kanada ini (lihat ms 788B–C dan 790G); *Re T (Infants)* [1968] 1 Ch 704, *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250 dan *G v G (Minors) (Abduction)* Vol 21 [1991] Family Law 519 diikut.

Adalah diakui si isteri mengekalkan kewarganegaraan Malaysia, tetapi memohon untuk kemastautinan tetap di Kanada. Maksud mudah yang adalah bahawa dia mengisytiharkan kepada pihak berkuasa Kanada bahawa untuk sepanjang hayatnya dia berhasrat Kanada menjadi negara di mana dia akan biasanya menetap. Adalah dijangkakan bahawa si isteri akan menghormati dan mematuhi undang-undang Kanada yang telah mengurniakan kedudukan kemastautinan tetap. Dengan itu, dia sepatutnya merujuk masalah tentang anak-anak kewarganegaraan Kanada kepada mahkamah-mahkamah Kanada dan mematuhi keputusan mereka (lihat ms 791B–C).

Oleh itu, di sini mahkamah mengetepikan perintah Mahkamah Tinggi tetapi mahkamah tidak mencapai sebarang kesimpulan mengenai siapakah di antara ibu bapa harus mempunyai jagaan eksklusif yang tetap atas anak-anak. Ini merupakan perkara untuk mahkamah Kanada. Anak-anak harus diserahkan kepada jagaan dan kawalan si suami yang bebas untuk membawa mereka ke Kanada iaitu kediaman suami isteri dan pemindahan harus berlaku secepat mungkin (lihat ms 792H–I).

Per curiam:

Seseorang wanita Malaysia akan memperolehi domisil suaminya selepas perkahwinan dan sehingga perkahwinan itu dibubarkan dengan sahnya, dia akan mengekalkan domisil suaminya. Dalam kes ini, tanpa mengira fakta bahawa si isteri memegang paspot Malaysia dan dengan itu mestilah dianggap sebagai warganegara Malaysia, keterangan di sini telah membuktikan bahawa dia tidak berdomisil di Malaysia. Terdapat faktor tambahan bahawa si isteri telah memilih untuk mendapatkan kemastautinan tetap di Kanada secara sukarela (lihat ms 784E–H).]

Notes

For cases on custodianship of children, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1766–1831.

For a case on the jurisdiction of court pertaining to custody of infants, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2185.

Cases referred to

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1989] 3 MLJ 40 (refd)
G v G (Minors) (Abduction) Vol 21 [1991] Family Law 519 (folld)
Kanmani v Sundarampillai [1957] MLJ 172 (refd)
L (Minors) (Wardship: Jurisdiction), Re [1974] 1 WLR 250 (folld)
Mahon v Mahon [1971] 1 MLJ 287; [1971] 2 MLJ 266 (refd)
T (Infants), Re [1968] 1 Ch 704 (folld)
W v H [1987] 2 MLJ 235 (refd)

Legislation referred to

Child Protection Act 1991
Civil Law Act 1956 s 27
Courts of Judicature Act 1964 ss 24(e), 42
Federal Constitution art 121, 121(1A)
Guardianship of Infants Act 1961 ss 1(3), 5
Law Reform (Marriage and Divorce) Act 1976 ss 3, 48(1)(c), 49(1), 87, 88, 100, 101, 104, 106(1)
Rules of the High Court 1980 O 41 r 5

Appeal from: Originating Summons No 24–64 of 1997 (High Court, Ipoh)

DA Devadason, R Devadason and *AM Kanda* (*Devadason & Devadason*) for the appellant.

Gurbachan Singh (*Bachan & Kartar*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): This is an appeal from the decision of the judge in the High Court at Ipoh on 3 May 1997 whereby he granted custody of two infant children to the respondent, their mother ('K'), with access to the appellant, their father ('B').

From any point of view, factual, legal, or human, this is a difficult case with very serious implications, not only for the parties but also those who will be affected by the judicial precedent this decision will set. The problem will therefore have to be approached with some caution.

B was born in Jaffna, Sri Lanka in June 1959. At some point in time thereafter, his family left that country. His parents eventually ended in Suhr, Switzerland. B and his sisters ended up in Toronto, Canada where B was conferred Canadian citizenship.

K was born in August 1962 in India. Her birth was registered with the Malaysian High Commission. She subsequently came to Malaysia where she initially resided with her parents.

On 7 July 1989, K entered Canada on a Malaysian passport. On 11 August 1989, B and K took out a marriage licence pursuant to which they were married in a civil ceremony in Canada on 18 October 1989. K was then 27 years old and B was 30.

In May 1991, just over one and a half year later, B and K came to Malaysia where they went through a traditional Hindu wedding in Ipoh. After this, they returned to Canada.

On 7 August 1991, K applied for and was granted *permanent* residence in Canada. Her application was sponsored by B.

Their son Kabhilan ('S'), their first child, was born in Canada on 5 February 1992. K's first Malaysian passport (No A2637947) was due to expire on 6 December 1993. She applied to the Malaysian High Commission in Ottawa for a new passport and was granted one (No A6737315) on 6 December 1993. The passport contained an endorsement that K had been granted permanent residence in Canada on 7 August 1991, that the new passport was valid only till 3 November 1998 and was not to be renewed without prior reference to the office of issue. On 5 November 1993, S was issued with a Canadian passport. In it he is stated to be a Canadian national. Armed with these documents, K, B and S came to Ipoh for a holiday on 17 November 1993 and returned to Canada the following month.

On 29 August 1994, K delivered Biruntha, their daughter ('D'), also in Canada. She is also a Canadian citizen. B was issued with a Canadian Passport No 237513 on 17 December 1996. He had D's name endorsed on his passport.

On 21 December 1996, B purchased air tickets for all of them on Singapore Airlines. They were routed from Toronto via London to Kuala Lumpur on 24 December 1996. The return date was fixed on 9 February 1997 from Singapore via Zurich to Toronto.

The family duly arrived in Malaysia on 25 December 1996. The passports of B and S were both endorsed by Malaysia's Immigation with a social visit pass — 'Permitted to enter and remain in West Malaysia and Sabah for two months from the date shown'. These passes would therefore have expired on 24 February 1997. The ostensible purpose of the visit was to come here for a holiday.

The family came to Ipoh and took up residence with K's father and mother. K's father, Shamugam a/l NSS Maniam ('KF') is a pensioner. He lives at 104, Jalan Pertama 4, Taman Pertama, Ipoh. Here they stayed together until 29 January 1997. That day, B left KF's house with his son and went to stay in the house of K's aunt. The reasons will come later. The family was due to return to Canada on 9 February 1997.

On 4 February 1997, Messrs Bachan & Kartar filed an Originating Summons No 24–64–1997 ('the OS') in the Ipoh High Court. The prayers were for the following orders:

(a) K be given custody of the two children S and D;

(b) an injunction to restrain B from seeing, meeting, beating, assaulting, interfering, or communicating with K or her parents in any way;

(c) costs; and

(d) such further order as may be just.

Together with the OS, Bachan & Kartar filed an ex parte summons in chambers praying for the following:

(a) custody of the children,

(b) an injunction in the same terms as aforesaid;

(c) costs; and

(d) such further and other relief as thought fit.

The OS and the summons in chambers were supported by an affidavit affirmed by K also on 4 February 1997 (K's first affidavit). The summons in chambers was fixed for disposal on 6 February 1997.

Neither K nor Bachan & Kartar gave any prior notice to B that they intended to resort to court action.

K's first affidavit was prepared with the benefit of legal advice from Mr Gurbachan Singh ('Bachan Singh'). Since this was her first version of her grievances, it merits careful analysis. Mr Bachan Singh himself affirmed another affidavit in support of the summons in chambers on 6 February. Much of the ex parte hearing on 6 February was taken up with convincing the learned judge at first instance that he had jurisdiction to make the custody order even though B and the children were Canadian citizens. A very grim picture was painted of B, and the learned judge made an interim ex parte injunction which restrained B from taking the children out of the jurisdiction until 20 February. The learned judge also directed the summons in chambers to be served inter partes and to be heard on 18 February 1997.

This interim order was served on B on 7 February 1997. As stated before, no previous notice of any kind was given to this man that his wife had resorted to law. By then, K had got custody of the children. B was out of the house and staying with K's aunt at No 40, Tingkat Ipoh 3, Ipoh Garden. He made a police report that night.

B then instructed Messrs Maxwell Kenion Cowdy & Jones. He affirmed an affidavit on 14 February 1997 in which all his wife's allegations of any current misbehaviour were substantially denied. B contacted the family doctor in Canada, Elizabeth George, who faxed a report dated 12 February 1997 that she had been the family doctor since 1989 and had not found any significant psychiatric problems with B and that he had not manifested any psychosis or thought disorder. This was the subject of an additional affidavit affirmed on 17 February 1997. B filed a second supplementary affidavit on 18 February. At the hearing that morning, Mr Paul Subramaniam appeared for B. Mr Bachan Singh asked for an adjournment to reply to B's affidavits. The matter was adjourned to 21 February.

On 20 February, B's solicitors were served with K's affidavit in reply affirmed on 19 February, an affidavit by KF and a further affidavit, affirmed on 20 February referring to the visit of an officer of the social welfare to their house on 17 February.

The hearing fixed for 21 February was now adjourned to 24 February 1997 at 2pm. On 22 February, K filed yet another affidavit, followed by another affidavit affirmed by Mr Bachan Singh to say that on 21 February 1997 he had filed a divorce petition for K which had been served on 23 February 1997. This petition contains a string of accusations about various alleged acts of cruelty on the part of B and alleged alcoholism and deviant behaviour.

On 24 February 1997, the arguments before the judge were again largely taken up by the issue of jurisdiction. The judge now made an order that interim custody be given to K, the mother, pending the outcome of the divorce petition to be heard within three months, with liberty to apply. B was directed to surrender the passport of his son to K. The only concession to B was that there was to be no order as to costs.

What is significant about this order of 24 February 1997 is that it made no provision whatsoever for access by the father to his children. He surrendered his son's passport as directed. He entered appearance to the OS on 28 February 1997. He changed his solicitors to Messrs Devadason Devadason ('B's solicitors') who applied to strike out the divorce petition on the ground that the court had no jurisdiction to entertain it.

This contest took place with affidavits filed by B on 5 and 18 March 1997. The matter was argued before another judge in the Ipoh High Court. He agreed with B's counsel and struck out the petition on 29 March 1997. He held that K, though a Malaysian citizen, had taken up permanent residence in Canada; that by virtue of this and the fact that her husband was a Canadian citizen residing in Canada, she had a Canadian domicile. Section 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') precluded the entertainment of any divorce petition unless both parties to the marriage were domiciled in Malaysia at the time the petition was presented. Section 49(1) of the Act only applied to wives who were resident in Malaysia *and* had been ordinarily resident for two years preceding the commencement of the proceedings.

For what it is worth, K filed a notice of appeal against this decision on 11 April 1997.

B now returned to the judge who made the interim custody order pending the disposal of the divorce petition. On 5 April 1997, he filed a summons in chambers under the OS for the following orders:

(a) that since the interim order of 24 February 1997 was conditioned to be effective only up to the disposal of the divorce petition and the petition had been struck out, the children be returned to him;

(b) that his son's passport be returned to him;

(c) that his wife be injuncted from filing any further applications for interim custody in abuse of the process of the court;

(d) that the OS be dismissed; A

(e) damages; and

(f) costs.

This application was supported by B's affidavit affirmed on 4 April. In it, he dealt with the absence of any meaningful access to his children since 24 February and spelt out the reasons why he should be permitted to take the children back to Canada as soon as possible. This summons in chambers was fixed for disposal on 17 April 1997. He filed a further affidavit affirmed on 10 April 1997. B

K affirmed an affidavit on 12 April 1997. Two other affidavits were affirmed by a Mr Paramanathan and the plaintiff's father (KF). All three were served on B's solicitors on 15 April together with yet another affidavit by Mr Bachan Singh. The same day, B affirmed a reply affidavit which contains a letter from K's aunt to confirm that throughout B's stay with her in Ipoh he was well behaved. C

Bachan Singh was engaged elsewhere on 17 April 1997. In the face of Mr Devadason's objection, the summons was now adjourned to 22 April 1997. On 21 April 1997, B filed yet another affidavit, and so did K the same day. D

Lengthy submissions were made by both learned counsel in chambers on 22 and 23 April 1997. The children were brought to court and seen by the judge (but not interviewed). The judge reserved judgment till 3 May 1997. The relevant portion of the order he made that day in chambers read as follows: E

> Court: The court holds after hearing submissions by both counsel that the court has jurisdiction to hear the application for custody by the plaintiff. The court now grants custody and control of the two infants to the plaintiff mother. Reasonable access to the father. With liberty to apply. No order as to costs. No order as to encl 18. F

The rest of the order gave access to B from 2pm on Saturday to 8pm on Sunday. He was required to surrender his passport during the period of access. G

Against this order, B filed his notice of appeal on 9 May 1997.

B's son's passport contains an endorsement that it was seen at the Immigration Office at Ipoh on 25 February and the social pass was extended to 24 May 1997. On 20 May 1997, it was seen again and extended to 24 August 1997. D's right to remain in Malaysia is tied to B's passport. We have not seen the relevant endorsement on his passport but we have no reason to believe that if D is to travel at all, she must do so with her father. K's averments that some unnamed persons in the Malaysian Immigration and Registration Departments have told her that if she is granted custody, she will be given unlimited extensions of residence for the children to be in Malaysia with a view to their being made Malaysian citizens cannot be accepted as evidence because O 41 r 5 of the Rules of the High Court 1980 requires the sources and grounds of such information to be specified before it can be given any credence. So also her averment H I

A that some unnamed official in the Canadian High Commission has stated that she could be issued with a separate passport for her daughter.

To turn now to the judgment of the court below, the very first point that has to be made about it is that the learned judge did not make any findings on the *contested* issues of fact. Indeed, the allegations and denials B on both sides were so vehement that it would have been impossible for any court of law to determine where the ultimate truth lay unless there had been a full scale cross-examination of all the witnesses.

Nevertheless the judge said this:

> Now there are many factors in my view which bring this application within C one of those rare, unusual, or exceptional instances, where an order of custody should be made. At the onset, from observations, I am inclined to the view that neither of the parents of these infants can said to be a 'wrongdoer' in the real sense toward the infants. I saw the infants in chambers, and they appeared to be taken care of, healthy, and bright, and this I would attribute substantially to the love and care of the plaintiff and D defendant. But the fact remains that there is an irretrievable breakdown of marriage between the plaintiff and defendant. The plaintiff/mother shows absolutely no indication of wanting to return to Canada under the present circumstances, as she fears for her life and safety. In view of the fact that the defendant did admit to being on probation for assault, these fears of plaintiff seem well founded. The medical reports further confirm this. There was E nothing unreasonable I felt, for the plaintiff refusing to return to Canada. She is prepared to devote her time and energy to bringing up the infant children here.

The question that immediately springs to mind is whether K's fears for her life and safety and the reasonableness of her refusal to return to Canada F has any objective basis.

The second question which arises is the period for which the mother was to have custody. As to this, the judge said:

> Ideally the court should be concerned to promote the child's long term future, but inevitably the court will tend to concentrate on the immediate G ties and environment of the child. To all this I say, that the infant children are best placed with the mother for the present, as it would be inconsistent with the true interest of the children to make an order disturbing the natural rhythm of childhood which in their earlier days should be with their mother.

The expression 'for the present' is not capable of precise definition. What H it must mean in all the circumstances of this case is that for some indefinite period the children must remain in Malaysia with her mother because her refusal to return to Canada is reasonable.

K had stated right at the outset in the afidavit Mr Bachan affirmed for her on 6 February 1997 that it was her intention to educate the I children in Malaysia and to request the Registration Department to make the children Malaysian citizens. On what legal grounds she hoped to achieve this was not explained. What is clear is that she meant to keep the children in Malaysia not 'for the present' but permanently, until such time as they qualified for Malaysian citizenship.

On the issue as to whether there was any objective basis for her fears for her life or safety, the crux of the case here was the well-being of the children. The judge accepted that they were much loved by the mother as well as their father, and that they were in no danger from him.

So far as K is concerned, the following aspects of this case appear to have escaped the judge's attention. K was 27 years old when she went to Canada. She stayed there for a month before she married B. K now affirms that B assaulted her and broke her nose. But she told her doctor that she 'had fallen and hurt her nose'. In a subsequent affidavit, she says she lied to the doctor to save the marriage and prevent her husband from being arrested. But a lie for however altruistic a purpose is still a lie. Far from her nose having been broken as alleged, the ENT specialist reported that K's x-ray was normal. More to the point, the fact that one and a half years after this both parties came from Canada to Ipoh to go through a traditional marriage, is proof that even if such an assault occurred, which B denies, the incident was condoned, and forgiven.

The next assault alleged was in May 1992. There are no details as to its severity. B has honestly admitted that he did so but pleads extreme provocation. What is significant is that K was able to get B put on probation very quickly. Obviously, the authorities in Canada were very quick to intervene where their protection was required. B has affirmed that it was the first and last time he hit his wife. There is no indication how long the probation was for. There is no evidence to support a finding that B was still on probation in 1997.

Once again, there is proof that the assault was condoned and forgiven. The parties and their son came to Malaysia for a holiday in November 1993 for a month and returned in December 1993. Their daughter was born in August 1994. It is therefore reasonable to infer normal relations during this period.

There is a third alleged assault in May 1996 with a cassette recorder. There is no concrete supporting evidence for this, apart from K's bare allegations and there is no supporting evidence of B's chronic alcoholism in Canada. There is no specific evidence of how much he is alleged to have consumed. The standards of a conservative Jaffna family in Ipoh and a young couple in Ontario may be very different.

Dr Elizabeth George issued one medical report on 12 February 1997. It does not suggest any abnormal behaviour on the part of B at all. A careful reading of Dr George's report of 14 February 1997 suggests that both husband and wife went together to Dr George for counselling in February 1990 and that they were referred to Dr John. There is no report from Dr John and it is certainly not suggested that either party was abnormal. After February 1990, Dr George only saw K and B on two further occasions. The last visit was on 14 September 1996. This adds up to four visits in seven years. It is not clear whether the physical and verbal abuse of which K complained to Dr George on each occasion was what occurred in May 1990 and May 1992 or on other occasions and what exactly the abuse consisted of.

But on the assumption that physical abuse occurred, the fact is that there is no medical evidence to support it. More to the point, once again the parties appear to have reconciled when they decided to come on holiday to Malaysia in December 1996.

What actually did happen between 25 December 1996 and 4 February 1997 when K fired the first shot is crucial to a proper judgment of this case. Mr Bachan Singh submits that his client came to a final decision on 30 January 1997 that B's conduct in her parents house between 25 December 1996 and 30 January 1997 was so intolerable that she could no longer be expected to live with him. She therefore instructed Mr Bachan Singh the following day to commence proceedings to ensure that she kept the children and would never ever have to go back to Canada.

Being the first affidavit she affirmed, the document is as significant for what it says as for what it does not. The first nine paragraph deals with B's alleged misbehaviour in Canada which we have already commented on. Starting from para 10 to 12 is her recital of her husband's misdemeanours in Ipoh. The complaint is that when she returned from the temple with her parents on 28 January 1997, her son reported to her that B had cried to his son that K had quarrelled with him. She says B suspected that K's visits to the temple was a pretext to go out with another man, and that day B and K had quarrelled to the point that B had threatened to beat her. She affirms that B left the house on 29 January 1997 with their son and went to stay with her aunt. She further deposes that on 31 January 1997 B only returned to K's parents' house after her father and mother appealed to B to return.

The significance of this event seems to have been missed by all concerned. There is no suggestion anywhere that B had in any way misbehaved himself in K's parents' house from 26 December 1996 to 28 January 1997. It is not suggested that he beat or scolded his wife, or got drunk or did anything else of the kind. In any case, had he done so, it is inconceivable that both K's parents would have gone and pleaded with B to come back to their house.

It is against this backdrop that we have to look at para 12 of K's affidavit. The conduct she says she cannot tolerate are past events which allegedly took place in Canada. She says she is afraid to go back because B will hurt her and her children. There is not a shred of evidence anywhere that he has ever hurt the children. The prayers in the originating summons and ex parte summons filed on the 4 February 1997 were, inter alia, to restrain the defendant from seeing, meeting, hitting, attacking, disturbing or contacting K *or her parents* in any way. There was not a shred of evidence anywhere that B had ever threatened or intimidated his wife's parents. As for K, we only have her bare assertion that he did so. Her parents have not filed any affidavit suggesting any misconduct on his part against their daughter. K's father's affidavit of 19 February 1997 only supports K to the extent that there was a heated quarrel between B and K's father on 28 January and there were constant quarrels between K and B. K's parents would hardly have gone out of their way to plead with their

son-in-law to return to their house if he was as violent or aggressive as K has made him out to be. A

In her first affidavit, K affirmed that after she returned to Canada in 1993, her mother-in-law (ie B's mother) had told her, 'Why didn't you stay back in Malaysia when you had a good chance to avoid beatings from him like this?'. She also affirmed that on various unspecified dates B had threatened to kill her with a knife and that B's sister and parents had advised her to divorce B. B's affidavits in reply contain a statement from both B's parents affirmed before a notary public that they never so advised under any circumstances, and were praying for a better life for the couple. B

What clearly emerges from the entire material placed before the learned judge below is that apart from the single assault about May 1992 which was admitted with a plea of mitigating circumstances, every other allegation of misconduct was denied. They were bare assertions by K with no credible independent evidence to support them, not even from K's own parents or her aunt with whom B sought refuge after he left K's parents' house around 28 January 1997. C D

What is also clear is that before she resorted to unilateral legal action through Mr Bachan Singh allegedly only around 31 January 1997, neither she nor Mr Bachan Singh gave any notice whatsoever to B that they were taking the matter to court. In legal parlance, this is 'trial by ambush'. Those who resort to such tactics do so to take advantage of the element of surprise. Significantly, there is nothing in K's first affidavit to state that it was necessary to proceed ex parte because if prior notice had been given, B would have taken the children away from their mother against their wishes. In short, this move was a pre-emptive strike calculated to bring about a total break because K had unilaterally decided to end the marriage and keep the children herself. E F

It was really most unfortunate for everyone concerned that K and her solicitors decided to proceed in such a peremptory manner. When emotions run high, reasoning becomes distorted. Harsh words are very dangerous because once uttered, they cannot be recalled.

K and her solicitors were not unaware of the provisions of the Act. If they thought that the Malaysian court could entertain her petition for divorce, they were obliged to comply with all the provisions of the Act. Section 106(1) of the Act reads: G

> 106 Requirement of reference to conciliatory body before petition for divorce
>
> (1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and *that body has certified* that it has failed to reconcile the parties: H
>
> Provided that this requirement shall not apply in any case —
>
> (i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse; I
>
> (ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;

(iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend;
(iv) where the respondent is imprisoned for a term of five years or more;
(v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or
(vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impractical. (Emphasis added.)

Since B was very much in Malaysia in February 1997, some attempt could have been made. But K's attitude is reflected in para 8 of her divorce petition which reads:

> 8 As the marriage is registered in Canada and both the petitioner and respondent is currently in Malaysia, no attempt for reconciliation has been made.

Viewed against the backdrop of K's professedly irrevocable decision never to return to Canada, this paragraph makes no sense, unless it is meant that any attempt at reconciliation should be made not in Malaysia but Canada. A court in Malaysia cannot in normal circumstances find, as the judge below purported to do, that a marriage has irretrievably broken down unless the conciliatory body has so certified. Section 106 of the Act is a second reason why the divorce petition was totally misconceived. It was obviously filed to achieve some tactical advantage related to the hearing which was due to take place that very day.

'Interim' custody implies a link to substantive proceedings and the order made on 24 February gave custody, without access to the father, till the divorce petition was heard.

The divorce petition has been struck out. Since an appeal has been filed for what it is worth, we will say no more about it except that ss 48 and 106 of the Act are formidable obstacles. K has realized this because she says she is going to stay on in Malaysia for the next two years and file another petition.

Be that as it may, the immediate crisis remains and must be resolved. The two legal issues before us can be formulated thus:

(a) bearing in mind that these children are Canadian citizens and they had come to this country on a holiday, has the court jurisdiction to entertain a custody application by their Malaysian mother?

(b) if the court has jurisdiction, was it correctly exercised by the Ipoh High Court when it gave the mother custody for an indefinite time in Malaysia?

Jurisdiction

Jurisdiction over the person and property of infants is conferred on the High Court by s 24(e) of the Courts of Judicature Act 1964 read with art 121 of the Federal Constitution (see also *W v H* [1987] 2 MLJ 235).

And s 27 of the Civil Law Act 1956 reads:

> In all cases relating to the custody and control of infants, the law to be administered shall be the same as would have been administered in like cases in England as at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

The other written law here would be the Law Reform (Marriage and Divorce) Act 1976 and the Guardianship of Infants Act 1961, in particular, s 5 which reads:

> Father to be guardian; order of Court as to custody
>
> 5 Subject to section 10, the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

and the Child Protection Act 1991.

Since both B and K ostensibly had the capacity to marry under Canadian law, s 104 of the Act requires the recognition of their marriage 'as valid for all purposes of the law of Malaysia'.

On the uncontested material before us, we are of the opinion any Malaysian woman upon marriage will acquire her husband's domicile and until that marriage is lawfully dissolved, she will retain the domicile of her husband. See *Halsbury's Laws of England* (4th Ed) Vol 8 para 431 at p 323. Also *Kanmani v Sundarampillai* [1957] MLJ 172.

Section 3 of the Act reads:

> 3 (1) Except as is otherwise expressly provided this Act *shall apply to all persons in Malaysia* and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia. (Emphasis added.)

Notwithstanding the fact that K holds a Malaysian passport and must therefore be presumed to be a citizen of Malaysia, it is our opinion that the evidence here has proved that she is not domiciled in Malaysia. In this case, there is the added factor that K freely elected to obtain *permanent* residence in Canada. When she applied for her Malaysian passport in 1993, she declared that her country of residence was Canada, and her passport dated 3 November 1993 says so. In her affidavit of 19 February 1997 (para 3) and also in her divorce petition, she avers that she is a Canadian permanent resident domiciled in Canada. The applicability of the Act therefore turns on the proper interpretation of s 3(1).

It was strenuously contended by Mr Rabin Devadason that the words, 'all persons in Malaysia' must be read to mean all persons 'ordinarily resident' in Malaysia. He submitted that the Act can have no application to tourists and other transient visitors. He referred us to *Mahon v Mahon* [1971] 1 MLJ 287 and on appeal at [1971] 2 MLJ 266. We were also

A referred to a number of other authorities on what constituted ordinary residence.

Mr Bachan Singh sought to convince us that K must be regarded as having a residence in Malaysia because she has retained her Malaysian citizenship. He said that her refusal to take up Canadian citizenship B proved her intention to return to this country.

Our view is that in the present context, the expression 'ordinarily resident' is only relevant to the divorce jurisdiction of the court. The use of the word 'domicile', as opposed to physical presence, in the second limb of s 3(1) and in 3(2) militates against Mr Devadason's interpretation. The C ordinary meaning of the first limb of s 3(1) therefore is that the Act applies to all persons physically present in Malaysia unless the Act otherwise provides. The Act also applies to persons resident outside Malaysia, provided they are domiciled in Malaysia but again only in those cases where the Act does not otherwise provide.

Since K is not domiciled in Malaysia but was in our view ordinarily D resident in Canada, the second limb of s 3(1) does not apply to her. But K and her children were physically present in Malaysia at all times material to this application. They come within the first limb of s 3(1).

We agree with K's counsel that the exceptions expressly provided in s 48 of the Act, which exclude jurisdiction to make a decree of divorce E unless both parties to the marriage are domiciled in Malaysia, is confined to Part VI of the Act. The opening words of s 47 are, 'Subject to the provisions contained in *this Part*'.

K's counsel submitted to the judge below and before us that because B entered an appearance to the OS, he must be deemed to have submitted F to the jurisdiction and therefore the judge had jurisdiction. We think this submission was misconceived. The issue here is not one of immunity which can be waived, but whether the required jurisdiction has been conferred by statute.

As to that we must look at in ss 87 and 88 of the Act, and for ease of G reference, we now reproduce the material portions which read as follows:

Part VIII

Protection of Children

Meaning of 'child'

H 87 In this Part, wherever the context so requires, 'child' has the meaning of 'children of the marriage' as defined in section 2 who is under the age of eighteen years.

Power for court to make order for custody

88 (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where they are exceptional I circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —
(a) to the wishes of the parents of the child; and
(b) to the the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

It is thus the opinion of this court that Part VIII of the Act was intended to cover all children who were physically present within the jurisdiction who do not profess the religion of Islam. Section 1(3) of the Guardianship of Infants Act 1961 and also art 121(1A) of the Federal Constitution refers. Clearly the Malaysian court did have jurisdiction and power to make any order required for the protection of the children in this case.

Two more sections of the Act are relevant. They are ss 100 and 101 which read as follows:

Court to have regard to advice of welfare officers, etc

100 When considering any question relating to the custody or maintenance of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

Power for court to restrain taking of child out of Malaysia

101 (1) The court may on the application of the father or mother of a child —
(a) where any matrimonial proceeding is pending; or
(b) where, under any agreement or order of court, one parent has custody of the child to the exclusion of the other,

issue an injunction restraining the other parent from taking the child out of Malaysia or may give leave for such child to be taken out of Malaysia either unconditionally or subject to such conditions or such undertakings as the court may think fit.

(2) The court may, on the application of any interested person, issue an injunction restraining any person, other than a person having custody of a child, from taking the child out of Malaysia.

(3) Failure to comply with an order made under this section shall be punishable as a contempt of court.

In coming to his decision, the trial judge said that he had taken into consideration the confidential report of the officer of the Social Welfare Department. The manner in which these reports were obtained call for comment.

After he was served with the ex parte order on 6 February 1997 and totally shut off from his children, B made a police report at 1.30am on 8 January. He must have been in a state of great agitation at the time.

K says that the report contains false allegations about cruelty to the children but this report *is not* in evidence so we do not know what it says. On 17 February 1997, K was required to produce the children at the police station for the welfare officer to view them. Mr Bachan Singh accompanied her. Thereafter, the welfare officer went to K's parents' home. At Bachan Kartar's request, the welfare officer sent two letters to Bachan Kartar in which the officer concerned stated his views which included some criticisms of B's allegations. These letters were exhibited in exhibits to K's affidavits and is the first time B saw them.

The point is that welfare officers should be even handed in their approach to family disputes when exercising their powers under the Child Protection Act 1991. The officer concerned here opened bilateral communications with the wife's solicitors by sending his reports only to them on 20 February 1997 and again on 24 March 1997, without sending copies to the husband, or even getting his side of the story. It would have been preferable in our view if the officer concerned reported directly to the court since he knew legal proceedings were pending. As matters stand, his reports can only be regarded as confidential in the sense that they were kept away from B's knowledge at the material time. This is undesirable because it lays the officer open to a charge of bias.

Was the jurisdiction correctly exercised?

There is a critical difference between the duration of the protection a court can accord to children who are long term residents of this country as Malaysian citizens or the children of Malaysian permanent residents, and those children who are only transient visitors to this country because they are children of foreign nationals.

In the case of the children of foreign nationals, it should be self-evident that the duration of the protection afforded should only be for so long as the children can lawfully remain in the country. In their case, we think it reasonable to state that where they are transient visitors, the court should only intervene if the harm to the children can be classified as a real and immediate danger to their physical well-being from anyone including their parents.

As to this, the judge made a positive finding that neither parent can be said to be a 'wrongdoer' in the real sense towards the infants. The only inference is that these children were in no physical danger from their father. The judge indeed went on to find the children were healthy and bright and well taken care of by reason of the love and care of the plaintiff and the defendant.

Inevitably therefore, we have to fall back on the other reason advanced to support his finding, namely that K was justified in refusing to return to Canada with her husband and their children.

Such a justification must rest on an acceptance of all her charges of misconduct as having been substantially proved. The onus was squarely on K. We are unable to understand how the judge came to the conclusion

that K's refusal to return to Canada was reasonable based on her untested allegations, all of which in material particular, were challenged by the husband. His oath was as good as hers, and neither party was cross-examined. Indeed, a critical examination of her allegations against the backdrop of all the circumstances raises a lot of unanswered questions which severely affects her credibility. A

For the reasons we shall now elaborate, we do not think it is desirable for the Malaysian courts to make a full inquiry into the wife-husband disputes in cases such as the present where the court is satisfied that no obvious harm will come to the children by sending them back to Canada. B

It is a pity that the cases of *Re T (Infants)* [1968] 1 Ch 704, *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, and *G v G (Minors) (Abduction)* Vol 21 [1991] Family Law at p 519 were not cited in the court below. They would have put matters in their proper perspective. This is not meant in any way as a criticism of counsel because the legal problems here were unprecedented in the Malaysian context. Indeed, we would commend Mr Rabin Devadason for bringing them to our attention. In the course of preparing this judgment, we have also noticed *Re F* [1991] Fam D 25; [1990] 3 All ER 97 which shows the correct approach in such cases. C D

Re T (Infants) is particularly instructive because the facts are very similar. The English mother went to Canada in 1960, and there met and married her husband a Canadian in 1961. They settled down in Alberta. A girl was born in 1961. A boy in 1963. The father was a reformed alcoholic. In July 1966, the mother came to England on holiday with the father's consent and brought the two children with her. She returned to Alberta with the children in August 1966. In November 1967, whilst the father was away on holiday, she took both the children and came to England. In December 1967, she commenced proceedings to make the children wards of the court. In January 1968, she filed for judicial separation on grounds of alleged cruelty. In May 1968, the court heard the husband's application to remove the children back to Canada. A considerable body of affidavit evidence was tendered and both sides were cross-examined. After a full hearing, the judge decided to send the children back to Canada with the father. The mother's appeal to the Court of Appeal was dismissed. E F G

The following passages from the judgment of Harman LJ (at p 714) are very relevant:

> Now he demands that the children should be taken back to Canada under his care. He says: H
>
> > 'These are Canadian children. The matrimonial home was in Canada. When my wife chose to marry me, she chose to make her home there too. That is where the children should go. My wife is welcome to come back. She is welcome, even if she does not come to my house, to come to Alberta, and there, if she can induce the local court or the provincial court so to decide, she may be able to get the custody, care and control of the children. But it is not tolerable that she by this one handed action should deprive me altogether, as she proposes to do, of any communication with my children at all, because I am a man who has a I

A living to earn and my living is earned in Canada, where I am in receipt of a good or an adequate salary.'

What is said against the wife is that she has determined for her own selfish reasons to cut these children off altogether from the society, comfort and help of their father, and that because she thinks she would prefer to live in England she comes to live in England and will have none of his proposals for reconciliation.

I think it is right to say that this court sets itself against these unilateral movements of children, which have been far too frequent in the last few years.

At pp 715–717:

It is said by counsel for the mother that this case differs from all those reported because they all were cases in which there was an order of a foreign court which was flouted or disregarded by the parent removing children out of that court's jurisdiction and here there is no such thing: there is no order of an Alberta court and, therefore, there is nothing to it in the sense that the court ought to set its face against it. I do not take that view at all. It seems to me that the removal of children from their home and their surroundings by one of their parents who happens to live in or have connections with another country is a thing against which the court should set its face, and that, unless there is good reason to the contrary, it should not countenance proceedings of that kind. That is precisely what the mother has done here. She did not go to the Alberta court, as she might have done, and obtain leave to take the children out of the jurisdiction — which for all I know she might have been granted. She simply took the law into her own hands and spirited the children away — a course of conduct for which the aeroplane gives facilities. I do not forget that the father a few days ago attempted something of the reverse kind, but he was attempting to take the children home, and, his efforts having been frustrated and he having expressed his regret for it, I agree with the judge in that I do not think too much account should be taken of that; nevertheless, all attempts of this sort ought to receive plain discouragement.

Pennycuick J decided this case largely, I think, on the model of the decision of Cross J in *Re H (Infants)* [1966] 1 WLR 381; [1965] 3 All ER 906 which was affirmed in the Court of Appeal [1966] 1 WLR 381 at p 394; [1966] 1 All ER 886 (CA). The essence of that case was that the children had been taken out of the local jurisdiction, which was an American jurisdiction, and brought over here; the father followed and moved in a more or less summary way to have them sent back. Cross J, in order not to have the delay caused by a prolonged and elaborate investigation of the charges and counter charges made by the parents, decided that where the children belong in a foreign jurisdiction and are brought over here, this court should send them back again if there is no obvious danger or obstacle against such a course, without necessarily going into the last dregs of the dispute between the parents and without more than such investigation as satisfies the court that the children will come to no harm. Pennycuick J said that he applied that principle here. But, as counsel pointed out, there is a difference, because in the instant case, there is no question of further investigation or further evidence to be adduced or further inquiries to be made: all that has been done: both sides have put in such evidence as they chose, each of them, the father and the mother, has been cross-examined,

> so far as their opponents wishes, and therefore, says counsel for the mother, the judge ought not to have decided this on an *Re H (Infants)* [1966] 1 WLR 381 principle at all: he should have come to a conclusion whether it was best that the children should be under the care of their father or their mother and decided the case accordingly — just as if, I see it, the two parents were living in the same jurisdiction and within reach of one another. The judge pointed out, and I think absolutely rightly, that, there is a case where there are 8,000 miles between the homes of origin of the parents, that is not the question at all: the question is, first, where do the children belong, where is the matrimonial establishment? Prima facie, the parent who breaks up the home cannot expect to profit from that conduct: he or she may be called a wrongdoer. Pennycuick J did hear all the evidence. He did, it is true, say that he followed *Re H (Infants)* and, in that, I think that he was making a slip. He had in fact all the facts before him which either party wished to lay before him. He decided that it was in the interests of these children, being Canadian children with a Canadian father and a Canadian grandfather, that they should go back to their home in Canada and that, if there are going to be disputes between the parents about their custody and control, the proper court to decide that was the Alberta court. In that I wholly agree with him; I think it is the right order to make in a case of this sort, where there is nothing to be said against the father's proposals that he should have the right to have them back with him in their proper home. There is nothing to prevent the mother following them. There is nothing to prevent the mother, if she wishes, obtaining access to them, and if necessary, applying to the Alberta court for that purpose. But this court is not to be compelled to say, in the abstract so to speak that the father or the mother ought to have the care and control: that is not the point in a case of this sort: the point is that these children belong in Canada and, other things being equal, there they should go. That is not to say that they are going to be cut off from their mother. She is perfectly at liberty to follow them if she chooses. She can go back to her husband — he says so — if she chooses. If she does not want to, she need not. But that she should by her own motion be able to create a situation where he is entirely cut off from them is something which I do not think the court ought to countenance.

We have set out the above passages at length because they clearly spell out the correct approach the judge below should have taken in this case. Of course, the basic rule is that the paramount consideration is the well-being of the infants. But where the children are Canadian nationals, the question is where do the children belong, where is the matrimonial establishment, and which is the proper court to decide the future of these Canadian nationals.

Re T (Infants) was applied *Re L.* Here, the father was German, the mother was English. The children were aged ten and eight. They were brought to England by the pretext that they were coming on holiday but the mother intended to leave the husband and live permanently in England. The court held that as they were German children, their long term welfare pointed overwhelmingly to a return to Germany where they had been brought up and in whose courts their future destiny should be decided if there was a dispute between the parties.

The third case, *G v G (Minors) (Abduction)* contains a comment by Nigel Lowe which we think correctly states the position for abduction cases from 'non-convention countries', ie:

> ... if the child's settled home was in that country, a peremptory order for the return of the child will be ordered unless there is some prima facie evidence either that the child would be harmed or that the host country would not apply the paramountcy of the child's welfare principle.

Admittedly, K retained her Malaysian citizenship, but *she* was the one who went to Canada to marry B there. She applied for permanent residence there. The simple meaning of this is that she declared to the Canadian authorities that for the rest of her foreseeable life she intended that Canada should be the country in which she would ordinarily reside. The very least that this court expects of K is that she will honour and abide by the laws of Canada which has, as an act of grace, conferred her with the status of permanent residence. She should therefore have referred her problems with regard to her Canadian children to the Canadian courts and abided by their decision.

The full text of the report *In re L* makes it clear that the words 'kidnapping' and 'abduction' in such cases has acquired a technical meaning which does not necessarily involve coercion. Both the husband and the wife have an equal right to the custody of the children. Therefore, both have an equal obligation to ensure that nothing is unilaterally done which has the practical effect of depriving the other of the society of the children. B is a Canadian. He has no right of residence here. To say he can come here and visit his children at will is impractical to the point of being farcical. There is here a strong suspicion that when she came to Malaysia on 25 December 1996, K already decided not to go back, because all her substantial complaints of misconduct relate to alleged incidents in Canada. There is no complaint of any misconduct in Malaysia meriting consideration till the quarrel on 28 January 1997 about the late night visit to the temple. The objective justification for her allegedly deciding suddenly on 30 January 1997 never to return is not convincing.

As to the circumstances which point the direction we now propose to go, we adopt the words of Buckley LJ in *Re L* at pp 264–265:

> To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in a new soil, and

> what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.

There is nothing in the judgment of the judge in the court below or in the affidavits filed to suggest that the wife and children are not in excellent health. In the course of hearing this appeal, we were very comforted to observe that this situation has continued and that both children are quite at home with their father as with their mother. In response to our inquiries, B's counsel informed the court that the parties were living in a rented 2½-bedroom apartment in Scarborough, Ontario. He assured the court that should K return to Canada, he would ensure that he would make this apartment available for his wife and the two children. He said he would live elsewhere with his sisters until some permanent arrangements can be made to resolve their problems. As for funds, he said he would make available at least half his monthly income of Canadian $1,200.

It will be remembered that when their quarrels ended in violence in May 1992, K was able to get the rapid and effective intervention of the Canadian authorities to prevent any further breach of peace. If need be, we are sure the Canadian authorities will, at K's request, give her all the legal protection she needs. If she makes out a good case, there is no reason why the Canadian courts will not give her custody.

The visit passes of S expires on 24 August 1997. It is not desirable that B and his children remain here any longer. We think B's offer of accommodation and at least half his month income until a Canadian court should decide on the matter, is a very reasonable offer. If the husband and wife live separately until the decision of the Canadian court comes through, K need not fear for her safety. K remained obdurate in the face of this offer. Mr Bachan Singh's words for her which came minutes after it was made were:

> Respondent dares not go back to Canada. She has waited for 7½ years tolerating the appellant's conduct and hoping he would change for the better but to no avail. She has lost any trust. He will make all the promises today and change his mind tomorrow.

We think however that since all the indications are that this matter will end up in the Canadian courts shortly after the parties set foot there, a Canadian court should take cognizance of B's offer which we have advisedly recorded here.

For all the reasons aforesaid, we hereby set aside the order of the High Court but we do not make any concluded view as to which parent should have permanent exclusive custody of the children. That is a matter for the Canadian courts. All we are ordering is that the children should be delivered into the care and custody of B their father who shall be at liberty to remove them to Canada to the matrimonial home at 100 Dandalk Drive, Apartment 914, Scarborough, Ontario, Canada. Such removal shall take place soonest possible but in any event before 24 August 1997.

A The actual time of delivery shall take place at a time, venue and date to be specified by B's solicitors to K's solicitors which shall be not later than 24 August 1997.

Should K wish to go back on the same flight, she may of course do so and the children shall be handed over to her at the matrimonial home B aforesaid in Canada. Should she remain unwilling to return, we direct B to make the necessary arrangements for his sister to assist him to care for these infants until the Canadian authorities decide otherwise.

This must have been an expensive exercise for B both in terms of personal trauma and financial loss, not to mention the seven months of C extra waiting he has had to suffer here. K prayed for costs in her originating summons. Since we cannot predict how the future will shape out for this couple, we feel constrained to make an order that she pay the costs both here and in the court below, and the deposit be returned to B.

We hope however that both parties can once again take stock of their respective positions and come to a sensible decision as to what to do with D their lives, always bearing in mind that they should sink their differences and see their children safely into adulthood, before each one thinks only of herself or himself as the case may be.

As the saying goes, in everyone's life some rain must fall. A good shower in times like this is the only way to remove the haze that not only E pollutes but also seriously impairs our vision. Balasubramaniam and Kohila for all their differences are still husband and wife. The reason for the quarrel on 28 January may have had deeply rooted psychic repercussions because of its religious overtones. But cross-border marriages carry with them the seeds of culture conflicts which should and can be amicably resolved. We can only hope that there will be a change for the better. F

Finally, we wish to place upon record our deepest appreciation to both Mr Rabin Devadason and Mr Bachan Singh for the invaluable assistance they have given us in going some way towards resolving a very difficult emotional conflict which the adversarial system is ill-equipped to cope. We hope they can use their good offices to minimize the trauma to G all parties concerned in complying with the orders of this court.

High Court order set aside.

Postscript

H After the court handed down its orders arising out of this judgment, Mr Bachan Singh applied for a stay of execution for a month. B's passport when examined showed that his visit pass had been extended by the Malaysian Immigration til 24 October 1997. Mr Bachan Singh and Mr Devadason both agreed that although Mokhtar Sidin JCA was absent, this application for stay could be dealt with by the two remaining judge on I the coram as provided by s 42 of the Courts of Judicature Act 1964.

The grounds for the stay were that the appeal to the Federal Court would be nugatory if the children were taken out of the jurisdiction by

24 August 1997. Mr Bachan submitted that his intention was to ensure that the children should remain in Malaysia until the appeal had been disposed of by the Federal Court. He submitted that if the children were not here until then, the appeal would be academic.

Mr Devadason opposed the application. He cited *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40.

The facts of this case are very far removed from the present, and we did not find it helpful.

The core reason of our judgment was that in the absence of any credible evidence that the children will come to any real harm if they are sent back to Canada, their father should be allowed to take them there as soon as possible. It was very undesirable to permit the children to remain in Malaysia to develop roots here. The law's delays had already resulted in their being here for seven months. Awaiting the result of an appeal would delay matters even further. Besides, it was not right to compel the father to stay back also which is what he would have to do to be near his children.

Any appeal to the Federal Court would require leave, which may or may not be granted after that court had considered the judgment of this court.

Kohila was entirely at liberty to apply to the Canadian courts at any time to grant her custody of the children.

In the circumstances, if any application for stay was to be made at all, we felt that such an application had to be made, not here, but in the Federal Court.

The application was therefore refused.

Reported by Jafisah Jaafar